Supreme Court, U.S.
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No. 08-762

IN THE

Supreme Court of the United States

JUAN DEREYES, FRANK JACOBY
and MICHAEL FENNER,

Petitioners,

v.

SHAUN WILKINS and ROY BUCHNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

I. Did the court of Appeals correctly deny qualified immunity to Petitioners on claims brought under 42 U.S.C. § 1983 that they violated Respondents' Fourth Amendment rights through coercion of false confessions from others to fabricate a false murder case against them, by use of that fabricated evidence to draft and obtain arrest warrants and criminal complaints, and arrest and incarcerate them when there was otherwise no probable cause to do so?

II. Where the Tenth Circuit did not exercise its pendent appellate jurisdiction to decide a statute of limitations issue during an interlocutory qualified immunity appeal, may this Court grant certiorari to do so?

III. Should the Court grant certiorari for the purpose of clarifying the scope of Fourth Amendment claims brought under a classical malicious prosecution theory where the limitations of the Tenth Circuit's qualified immunity review of the District Court decision significantly restrict this Court's ability to do so?

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INTRODUCTION, SUMMARY OF ARGUMENT

Petitioners seek review on certiorari of a decision on a limited interlocutory appeal of a District Court decision denying them qualified immunity on a Fourth Amendment violation claim brought under 42 U.S.C. § 1983. In an effort to persuade this Court to broadly review the range of Fourth Amendment claims which may be brought under a classical malicious prosecution theory, and also to consider a statute of limitations issue not decided by the Tenth Circuit, Petitioners ignore the restrictions placed on such interlocutory appeals by this Court, and followed by the Tenth Circuit. They flood their petition with factual allegations the district court determined not to be among those appropriate for consideration in the light most favorable to Plaintiffs/ Respondents, then argue issues not decided by the Tenth Circuit.

In response to this confusing petition as well as both its dangling unpresented issues, and issues not decided by the court of Appeals, Respondents reframe the questions presented and restate the facts in the light most favorable to Plaintiffs in the language of the Courts below. The facts on which the district court relied were accepted by the Court of Appeals as required by *Johnson v. Jones*, 515 U.S. 304 (1995). They also rely on overstated circuit splits. We then oppose the grant of certiorari on the grounds that the Tenth Circuit correctly decided the qualified immunity issue in a way which does not importantly conflict with the other circuits identified by Petitioners. This limited qualified immunity decision on interlocutory appeal does not permit the broad review which Petitioners seek of Fourth Amendment violations which are brought in a

classical malicious prosecution context. We also oppose the grant of certiorari on the statute of limitations question on the ground that the Tenth Circuit was not required to decide it as part of this limited qualified immunity appeal, and did not do so. In the process, we oppose the reservation of the right to later include other issues in the case if the Court grants certiorari. Finally, we argue that the arguments of Amicus have no relationship to the case as it stands.

COUNTERSTATEMENT OF THE CASE

Petitioners have submitted a version of facts which includes inadmissible evidence and evidence which the District Court ruled could not be considered on the qualified immunity issue. Petitioners' version varies importantly from the factual determinations made by the District Court and followed by the Tenth Circuit on the issue of qualified immunity, the only question which can be brought before this Court. Because the facts must be considered at this stage of the case in the light most favorable to the Plaintiff, and the Defendant cannot and did not appeal factual determinations of the District Court, *Johnson v. Jones*, 515 U.S. 304 (1995); *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), respondents here submit verbatim the facts as set forth in the Tenth Circuit and District Court decisions, omitting record citations and discussions from both opinions[1]. We object to the various

[1] Appendix references are to Petitioners' Appendices page numbers unless otherwise indicated.

factual assertions of the Petitioners which vary from those determinations.[2]

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[2] The Petitioners' most egregious efforts to put improper allegations before this Court to entice votes for certiorari are centered in their misrepresentations about the statements of Nieto and Popeleski and misuse of polygraph information. Footnote 1 of the petition relies on a polygraph which the District Judge ruled inadmissible at App. F, 85-91, which Petitioners wrongly submit as a fact this Court should consider. All of the Petitioners' assertions that the statements of Popeleski and Nieto were consistent are deceptive—they fly directly in the face of the findings and factual conclusions in Respondents' favor as set forth by the District Court and Tenth Circuit, both of which found that the ultimate consistency of these statements was brought about by Petitioners' extensive coercion which was detailed in both decisions. Petitioners' claim that Nieto and Popeleski's identical statements "were corroborated by investigative polygraphs of Popeleski, Nieto and Wilkins which established Wilkins as the trigger man and Buchner as an accomplice" Ptn. 4-5, is both false and directly contrary to the decisions made below which were not appealed. The District Judge fully considered these polygraphs and said those of Nieto and Popeleski "indicate that they were truthful when they denied killing Ben Anaya, Cassandra Sedillo, and the children, but also indicated that they were deceptive when they said that they were not present for the killings and did not know who the killer was." The District Court found, considering the evidence in the light most favorable to Plaintiffs, that the polygraphs "do nothing to connect Plaintiffs to the murders. In fact, they mean little outside the context of Nieto and Popeleski's statements." (App. 130) As for Wilkins' polygraph that Petitioner Fenner said was deceptive (App. 130), the District Court declined to base probable cause on that alone, and in the end that is all Petitioners offered which was arguably relevant and admissible. (App. 131). Because this information was not in

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"On April 14, 1996, Ben Anaya, Sr. discovered at his cabin the dead bodies of his son Ben Anaya, Jr., his son's girlfriend Cassandra Sedillo, and Sedillo's two children Matthew and Johnny Garcia, ages two and three. The adults had been shot, and the children then starved to death after being locked in the cabin alone. The resulting investigation revealed the murders had taken place between December 12 and December 18, 1995.

"Anaya, Jr. had been a member of the 18th Street Gang. The officers, experienced with

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the affidavit for the arrest warrant, the Tenth Circuit refused to consider it at all, declining to "search for probable cause in a pile of unrevealed information." App. 25. The Petitioners' claim that the adults were shot "execution style" is based on proposed expert testimony of Petitioner/Defendant DeReyes which the state criminal trial judge excluded at trial, and was not part of the District Court or Court of Appeals decisions. The Court of Appeals did not address whether Nieto or Popeleski is still incarcerated, but Petitioners nonetheless make an assertion about that. The extent to which representatives of the District Attorney's office witnessed these interviews and whether they made the decision to charge Respondents is not addressed in either the Tenth Circuit's opinion, nor in the District Court's Qualified Immunity decision. Petitioners raised it in a motion in limine to restrict damages evidence which was ruled on separately by the District Court App. 134, and has no possible relevance to this qualified immunity appeal. Petitioners' record citations for this and other assertions are to portions of the Appendix addressing issues other than the qualified immunity argument which are not on review in this interlocutory appeal. *See Johnson v. Jones, supra.*

Albuquerque gang activity, were part of a multi-unit task force investigating the murders. Their suspicion focused on Anaya's fellow gang members. In the course of their investigation, the officers brought in for questioning gang members Shawn Popeleski, Lawrence Nieto, and Plaintiffs, among others.

"Initial Interviews

"During initial interviews in April 1996, Popeleski and Nieto denied knowing who committed the murders. Disbelieving their stories, the officers brought the suspects in for further interviews. The officers pushed hard for Nieto and Popeleski to implicate Wilkins and Buchner in the quadruple homicide. DeReyes in particular had a personal interest in proving Wilkins committed the crime because "Wilkins had done a drive by shooting on his (DeReyes') house, . . . and his family was threatened by that and had to move." App. 1920. As a result of these interviews, both Nieto and Popeleski eventually implicated Plaintiffs. It is from these interrogations that the claim of fabricated and coerced testimony arises.

"Coercive Interrogations and Fabricated Evidence

"Plaintiffs contend the officers fabricated evidence by intentionally extracting matching false statements regarding Nieto's and

Popeleski's knowledge of the murders and then used the statements as the sole basis for Plaintiffs' subsequent arrest and trial. They claim the officers, using threats and promises, took advantage of Nieto's and Popeleski's age (18) and Nieto's learning disabilities to persuade them to implicate Wilkins and Buchner. The officers threatened them and their families with harm, promising leniency and protection if they cooperated.

"Based on these threats and promises, a series of interrogations in May 1996 yielded nearly identical statements from Nieto and Popeleski, both implicating Plaintiffs Wilkins and Buchner in the quadruple homicide.

"The first interrogation of Popeleski took place on May 10, 1996. Although coerced, Popeleski did not provide any useful information that day. But the very next day—and allegedly as a result of May 10 coercion—he quickly implicated Wilkins. He told the officers that Wilkins and Nieto arrived at the cabin and partied with Anaya, Sedillo, and Popeleski on the afternoon of the murders. After Wilkins and Nieto had apparently left and Anaya and Sedillo had gone to bed, Popeleski was outside when two men in ski masks surprised him. One of them held Popeleski on the ground while the other, whom Popeleski recognized as Wilkins, went into the

cabin.[3] Popeleski heard gunshots, footsteps, and the front door being locked. He saw the two men run back toward a car that looked like the one Wilkins and Nieto had arrived in earlier. Popeleski tried to chase them in Anaya's jeep but lost them when the jeep stalled.

"After the Popeleski interviews, the officers reinterviewed Nieto on May 11, 1996, and coerced a false statement blaming Wilkins for the murders. According to police affidavits, Nieto confessed that when Wilkins visited him shortly after the murders appeared on the news, Wilkins told him he had done "some s * * *" at the cabin. Nieto did not supply any additional details. An arrest warrant was issued for Wilkins based on this information.

"The officers interviewed Nieto again on May 13, 1996. Unlike his May 11 interrogation, during which Nieto placed suspicion on Wilkins simply by relaying to the officers Wilkins's statement of doing "some s***" at the cabin, the May 13 interview produced a more detailed account. According to Nieto's affidavit, "a lot more interrogation took place outside of that which was videotaped" on May 13. App. 1920.

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[3] On April 15, 1996, Fenner noticed marks in the dirt outside the cabin "where it appeared someone had been running, tripped, and fell." The officers argue this evidence corroborated Popeleski's statement that he was surprised from behind and ordered to the ground.

"The officers allegedly forced Nieto to corroborate the story Popeleski had told them earlier, blaming both Wilkins and Buchner for the murders (although Popeleski had not yet actually mentioned Buchner). "I [Nieto] didn't think I had any choice except to go along with the story [the officers] said they knew and said Popeleski had told. They went over it in detail, then talked to me on the videotape, then went over it again, then talked to me again on the videotape. They put words in my mouth. They supplied the details of the story, then when I told them something, they pressured me to change it."

"In the end, Nieto gave two statements, each differing in the details but both implicating Wilkins and Buchner, whom Nieto placed at the cabin with Wilkins. Buchner was arrested for the murders on May 13.

"On May 15, 1996, Nieto was interviewed by Agent Lucero of the New Mexico state police, who is not a defendant in this case. Plaintiffs do not contend Lucero used any coercive tactics in this interview, although they claim the statements resulted from the earlier coercive interrogations. Moreover, according to Nieto's affidavit, right before his May 15 interview the officers "coached [Nieto] to change the [May 13] story. . . . [He] went along with that because they pressured [him] to do so."

"In the interview, Nieto told Agent Lucero that Wilkins and Buchner came to his home and asked him to go to the cabin with them to party. Wilkins had a .22 caliber pistol lying on his lap, and on the way to the cabin Wilkins and Buchner told Nieto they were going to kill Popeleski. After spending time at the cabin, Wilkins, Buchner, and Nieto left the cabin, walked back to their car, and donned ski masks and gloves. Nieto had a shot gun, Wilkins the pistol, and Buchner a rifle. After waiting some time, the three went back to the cabin. They saw Popeleski outside, and Wilkins told Nieto to get him. Nieto surprised Popeleski and told him to get on the ground while Wilkins and Buchner entered the cabin. When Nieto heard shots inside, he fired a shot into the air, and Popeleski ran. Wilkins and Buchner were carrying drugs and guns from the cabin and Nieto joined them as they returned to the car. Buchner went back to the cabin to lock the front door, and the three left the area together.

"The officers, at that point, had detailed statements from both Nieto and Popeleski, implicating Wilkins in the murders. One major difference remained, however, in that Popeleski's account deviated from Nieto's by omitting Buchner's participation. The officers went back to Popeleski to try and reconcile the two versions of what they wanted to be the same story. When Popeleski was reinterviewed on May 15, 1996, he said he had

> not mentioned Buchner's presence at the cabin previously because Buchner was from Corrales, and Popeleski had a friend in Corrales he was trying to protect from Buchner. The two accounts were now nearly identical in all relevant respects."

App. 3-8.

Upon considering these facts and the findings of the District Court concerning the videotaped statements and other evidence, the Tenth Circuit declined to go behind or further evaluate the factual findings of the District Court concerning coercion. *Johnson v. Jones*, 515 U.S. 304, 315. App. 20. The District Court's careful explanation of how these statements were obtained follows:

> **"Interviews of Lawrence Nieto**
>
> At the time of Nieto's interviews in the early spring of 1996, he was eighteen years old. He attended school until the 9th grade and was in special education classes. He had difficulty learning and reading. He got his nick-name, "Woody," from family and friends because he is "not really that bright."
>
> "On April 17, 1996[4], Jacoby and DeReyes interviewed Nieto after reading him his

[4] "Plaintiffs claim that Defendants threatened to harm Nieto's brother if he did not give them the confession they wanted. ... in his Affidavit Nieto stated that he 'was told by DeReyes and the State Police Officer that the word would be let out that my brother was a snitch, and that he and my family would be killed if I did not go along with this story.' "

Miranda rights. At the conclusion of the interview, DeReyes told Nieto, "And if I find out that you're lying to me and you wasted our time bro, I tell you, I'll come looking for you personally, and I'll jack you and I'll charge you with an open count of murder and conspiracy."

"On May 11, 1996, DeReyes and Fenner interviewed Nieto again. The video/audiotape and the transcript of the interview indicate that some portions of the interview began before the tape began recording. Furthermore, the interview took place in the morning of May 11 after Nieto had been up all night 'partying,' a fact known to the interviewer(s). Nieto can be seen yawning during several portions of the interview. At the outset of the interview, Nieto twice unequivocally expressed his desire to talk to a lawyer. ('I want to talk to a lawyer right now.'), ('I want a lawyer . . .'). However, defendants did not stop the questioning for Nieto to talk to counsel; instead, DeReyes implied that Nieto was not entitled to talk to an attorney because he had not yet been charged with a crime. ('You want to talk to a lawyer about what, bro? . . . Why do you want a lawyer if you haven't been charged? . . . Well, how can you request a lawyer if you haven't been charged?')[5] *See also* Nieto Aff. ('I had

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[5] ". . . denial of his request to speak to an attorney . . . may be considered as one of several factors under the totality of the (Cont'd)

already asked for a lawyer, and they told me that I didn't need one, so I was sure I had no way to get any help at all.').

"Defendants also made offers to help Nieto with his legal troubles and to ensure his physical protection in exchange for information on Wilkins' involvement in the murders. ('We want to help you, bro. We'll help you. You'll get a new life. You'll get out of town, because I'll tell you right now, Woodrow, I got three felonies on you right now, homie.'), ('I'm going to give you squina, and you're going to owe me big time, Woodrow, because I'm going to keep your ass alive.'), ('And you're going to be gone, bro. You're going to disappear. Isn't that right, Woody?'). *See also* Nieto Aff. ('I also got assurances that if I did so, nothing would happen to my family or to me. They talked about moving us away to protect us, and even mentioned helping us to go to live in Taos.').

"DeReyes also indicated that he thought Nieto was involved in the drive-by shooting at his home, and, viewing the evidence in the light most favorable to the Plaintiffs, one could infer that DeReyes implied that he would harm Nieto unless he pinned the driveby and the murders on Wilkins.

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circumstances in determining whether his statement was involuntary." *Johnson v. State of New Jersey*, 384 U.S. 719, 730-31, 735 (1966).

"Q. 'It was my house. That was my crib, bro. That was my house, my familia. That's personal, bro. I don't go to your pad. I don't go to anybody's pad unless it's business.'

A. 'Yes, sir.'

Q. 'And I will fuck with anybody, and the child's dead.'

A. 'Yes, sir.'

Q. 'Respecto.'

A. 'I know. That's what I'm saying. I didn't (inaudible).'

Q. 'You call that respecto, bro? You broke that respecto right now when you went to my house and did that shit. And I always knew they'd get you, bro. And I suspected someone, and I've been looking, bro, and I found out who it was, and I wanted you to tell me who that person was. I tell you about it, and you're going to pin this dude up, bro. You're going to pin him up, not only on the homicide, on the homic, but you're going to pin him up on the drive-by, him, Shorty, and Weasel.'

"In addition to the foregoing, DeReyes made other statements which, viewed in the

light most favorable to the Plaintiffs, implied that he wanted to pin the murders on Wilkins as revenge for the drive-by on his home, and that the only way for Nieto to help himself was to say that Wilkins was involved:

> Q. '[Y]ou're going to give me a statement, bro, on your word that Sagger,[6] Weasel and Shorty did the drive-by, just like you told me.'
>
> A. 'All right.'
>
> Q. 'And you're going to also say in that statement, about the other stuff, that you know that Sagger and Easy went up to the cabin in a stolen car the day that this happened. And that's how you're going to clear yourself, bro, because when I go to court on this to present that, they're going to ask you for that, and they're not going to ask for my word, your word . . . Because that's the only way it's going to happen, and that's the only way it's going to keep you alive, bro.'

"Defendants also implied that if suspicion rested on Nieto (something that would happen if he did not give a statement against Wilkins), Nieto would not be able to be with his unborn child.('If it comes back that you did this shit, we're going to come back with a

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[6] Wilkins was known as Sagger (App. 64).

warrant and we're going to pick you up, and we're going to say, 'Woodrow, somebody else is going to have to be with your kid until you get out of jail.' ").

"The Court finds that, when viewed in the light most favorable to the Plaintiffs and in applying the 'totality of the circumstances' test established by the Supreme Court and the Tenth Circuit, Nieto's statements inculpating Plaintiffs were coerced." (App. 106-111) (record references omitted)

"Interviews of Shaun Popeleski

"At the time of each of the interviews in this case, Popeleski was unaccompanied by legal counsel and was either eighteen or nineteen years old.[7] He is originally from Korea, and at the time of the interviews he had been in the United States between five and a half and six and a half years. He took special courses in English as a second language, and stopped attending school in the ninth grade. Defendants DeReyes and Jacoby, who conducted the first interview of Popeleski on April 15, 1996, therefore were aware of this background information during all subsequent interviews. DeReyes and Jacoby interviewed Popeleski a second time on April

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[7] Popeleski provided two different dates of birth to police. In his May 10, 1996 interview, he admitted that the first date of birth he provided was incorrect.

17, 1996. The record before the Court reveals no coercive conduct by Defendants at either the April 15 or April 17 interview,[8] and at both of these interviews Popeleski denied having been present for the murders.

"DeReyes and Fenner conducted a third interview of Popeleski on May 10, 1996. Viewed in the light most favorable to the Plaintiffs, the transcript of that interview reveals that DeReyes made various promises to Popeleski in return for Popeleski giving him information about the killings. For example, it appears that DeReyes offered to take Popeleski to Mississippi to escape retribution from fellow gang members. ('You guys told me from the start that you were going to take me to Mississippi.'), ('I can get your butt out, out of this whole mess and sent to Mississippi and nobody will ever hear of Popcorn again.'), and (same).

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[8] Plaintiffs point to some comments by Defendants that the Court finds to have no bearing on the issue of coercion. For example, Plaintiffs rely upon Jacoby's statement to Popeleski at the conclusion of the April 15, 1995 [sic] interview that "as far as anybody's concerned, I'm your attorney." However, reading and hearing the statement in context, it is clear that Jacoby was writing out his contact information for Popeleski on a blank sheet of paper, rather than handing him his official card, so that no one would know that Popeleski had spoken to the police and that Jacoby was telling Popeleski that he could tell others that Jacoby was his attorney, rather than a policeman. At this stage, Popeleski did not ask for and was not denied an attorney.

"DeReyes also made vague threats against Popeleski, who initially claimed no personal knowledge of the incident, if he didn't make a statement about the murders. ('I told you already that I'm going to hang your ass if you lie to me.'), ('I want to know why and who did it today. You're not going to leave this place until you tell me. You're not.' and 'If you don't tell me, I'm going to burn your butt to the ground with The M.[9] I'm going to do you hard, bro.'). Some of those threats were not direct threats by DeReyes himself, but rather 'reminders" to Popeleski about what sort of treatment he could expect in prison without DeReyes' help. ('And I tell you right now, Bro, your butt is dead if you hit the pinta. You won't make it through the pinta.').

"DeReyes also implied that he could smooth things over with the district attorney on other charges pending against Popeleski or help him in other ways, provided he gave DeReyes the information he wanted. ('And all these charges that you're looking at, they all depend on me talking to the DA, period.'), ('[R]ight now the only thing you've got, Homes, that's keeping your ass, is me. . . . Then you start talking, Bro, or your ass is out on the line by yourself. You're back to BCDC.'), ('You're already screwed. I'm trying

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[9] Based upon the context of this and other references to "The M" (pronounced "eme") contained in the interview, the Court assumes this to be a prison gang.

to get you out of this.'), ('You better start talking, Homes. Convince me otherwise, because I am your savior, Homes. I am the one that's going to get you out, or the one that's going to put you back [in jail].'), and ('[T]he only way you're going to get out of this is you're going to have to convince me otherwise'). The videotape of this interview also shows DeReyes at times standing over and shouting at Popeleski, who is seated the entire time and crying for significant portions of the interview. At no time during the videotape of this interview does Popeleski admit knowledge of what happened on the day of the murders.

"Fenner and an unknown questioner conducted the fourth and final interview of Popeleski the following day, on May 11, 1996. In this short videotape, which begins mid-interview, Popeleski asserts that he was urinating outside the Torreon cabin when he was approached by two masked men, one of whom he recognized as Wilkins by his voice and by a tattoo. In the interview, Popeleski relates how the second man held him on the ground at gunpoint while Wilkins and possibly others went into the cabin, at which time he heard five shots. Then he heard the running footsteps of his assailants. Popeleski admits running from the scene and driving away in Ben Anaya's jeep. There are no obvious signs of coercion by Defendants in the tape of the May 11 interview.

> "Viewing all of the evidence in the light most favorable to the Plaintiffs and with regard to clearly established law as it stood in the spring of 1996, the Court finds that Popeleski's statements were involuntary. Like Nieto, he was young, unrepresented by counsel, and had limited education. He also had lived in the United States for only a portion of his lifetime and spoke English as a second language. However, most egregious are the promises of help and safety, as well as the threats of harm, used by Defendants to secure Popeleski's statements."

App. 112-116.

The District Court considered each element of the constitutional claim against each of the Defendants, and determined that each was established. On the requirement that Defendants have initiated an action against the Plaintiffs, the Court found that Jacoby drafted the arrest warrants and complaints in conjunction with DeReyes and Fenner, and that they were based on the coerced statements. The Tenth Circuit accepted, and did not review these evidentiary evaluations on appeal, citing *Johnson v. Jones, supra.* (App. 20).

> ***"Criminal Prosecutions and Mistrials***
>
> "As a result of the investigation, Buchner and Wilkins were arrested and charged with capital murder. At Buchner's preliminary hearing on May 26, 1996, and at Wilkins's

preliminary hearing on July 29, 1996, the prosecution called Popeleski to testify.

"He testified consistent with his May 11 and 15 statements. Nieto refused to testify on both occasions and was declared unavailable. Agent Lucero instead testified as to Nieto's May 15 statement.

"Wilkins went to trial on September 22, 1997, and Buchner went to trial on November 3, 1997. Nieto and Popeleski both refused to testify at Wilkins's trial, but their prior statements were admitted. Nieto testified at Buchner's trial only to the extent of telling the jury that the interrogating officers had forced him to lie about himself and Buchner being at the cabin. Neither jury could reach a verdict and mistrials were declared.[10]

"The state initially decided to retry Buchner and Wilkins, but the trial court determined that Nieto's statements would be excluded from evidence in the retrials as inadmissible hearsay.[11] In light of the exclusions, the district

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[10] Nieto and Popeleski were also charged with the murders. Nieto testified in his own defense consistent with his May 15, 1996 statement and was convicted, receiving four consecutive life sentences. Popeleski did not testify at his trial, and was convicted of the children's murders. He received a sixteen-year sentence.

[11] These appellate decisions preceded this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) which would have excluded all of these statements from the criminal trials on confrontation grounds different from those relied on by New Mexico Courts.

> attorney decided to dismiss the charges because insufficient evidence existed to go forward with the prosecutions. Accordingly, the district attorney dismissed the criminal cases in January and March 2001, reserving the right to retry both men."

(App. 8-9)

Though the Petitioners generally accurately, though argumentatively, describe in general terms the course of proceedings in the civil action, they repeatedly mischaracterize the Tenth Circuit's opinion. They misstate the foundation for the decision, and claim it implicitly decided the statute of limitations issue on the qualified immunity interlocutory appeal.[12] The Court remanded the issue to the District Court, but thereafter only decided the qualified immunity appeal, and did not exercise pendent appellate jurisdiction over the statute of limitations issue to rule on it. It is not subject to certiorari in this Court.[13]

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[12] Petition for Certiorari at 11, 14, 23.

[13] See Statute of Limitations discussion App. 10-11, the Court's conclusion App. 34, and argument II below.

REASONS FOR DENYING THE PETITION

I. THE FIRST QUESTION PRESENTED SEEKS TO HAVE THIS COURT CONSIDER THE PARAMETERS OF THE COMMONLY REFERRED TO SECTION 1983 MALICIOUS PROSECUTION CLAIM. THERE IS NOT A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS ON THE CONTOURS OF THE FOURTH AMENDMENT CLAIM MADE HERE, AND THIS IS NOT AN APPROPRIATE CASE TO DECIDE THE FULL SCOPE OF THAT CLAIM

This is a very fact bound case decided in a limited appeal, not conducive at this qualified immunity stage to the amplification and clarification of the scope of a Fourth Amendment claim brought in the malicious prosecution context under Section 1983, and the Court of Appeals did not decide the statute of limitations question on which Petitioners place so much weight.

Moreover, the claimed constitutional application by the Tenth Circuit in this case as well as the claimed circuit conflicts are not as Petitioners and their amicus characterize them when it comes to Fourth Amendment based claims sounding in malicious prosecution. In *Albright v. Oliver*, 510 U.S. 266 (1994), the Court eliminated substantive due process as a foundation for many constitutional malicious prosecution claims, the majority of the Court concluding that the Fourth Amendment provided the constitutional basis for such claims because it is a specific provision which preempts the more general due process analysis. Since *Albright* had made no Fourth Amendment claim, *Id.* at 271, the

parameters of the application of the Fourth Amendment in that context were left undecided by this Court. While they have not been uniform in their explanations of such claims, the disagreements among the Circuits as they apply to this case are exaggerated by Petitioners, and do not justify granting certiorari in this fact bound qualified immunity case at this stage of proceedings.

Two broad approaches have developed to fourth amendment claims brought in the malicious prosecution context.[14] The differences are more subtle than substantive. See discussion in Note, J. Goldstein, From the Exclusionary Rule to A Constitutional Tort for Malicious Prosecution: 106 Columbia L.Rev. 643, 655 *et seq.* Falsification of evidence to obtain an arrest warrant not only results in suppression in criminal cases, but is also widely recognized as actionable under 42 U.S.C. §1983. *Malley v. Briggs*, 475 U.S. 335, 344 n.6. Yet, it cannot be disputed that this Court has not spoken broadly nor comprehensively in this constitutional "malicious prosecution" fourth amendment area. The Court said as much in *Albright*, 510 U.S. 266, 270-71 (plurality opinion) and more recently *Wallace v. Kato*, 127 S.Ct. 1091, n. 4.[15] The Court has denied certiorari in

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[14] *Castellano v. Fragoso*, 352 F.3d 939 at 949 (5th Cir. 2003), cert. denied, 543 U.S. 808, 125 S.Ct. 31, 160 L.Ed.2d 10 (2004) and 543 U.S. 808, 125 S.Ct. 33, 160 L.Ed.2d 10 (2004). The division there described places some Circuits in the not supported by current case law. The Tenth Circuit is an excellent example, as seen in this case.

[15] In that footnote, the Court cited 1 *M.Schwartz*, Section 1983 Litigation § 3.18[C], pp 3-605 to 3-629 as noting a range of approaches in the lower courts.

one case which broadly discussed the area but decided no Fourth Amendment question,[16] and in another qualified immunity appeal.[17]

The primary circuit split argument of the Petitioners proceeds on a false premise about this decision. They say the Tenth Circuit "applied both a Fourth Amendment . . . and a common law malicious prosecution analysis."[18] And, they rely on this misstatement throughout their petition, characterizing it as "grafting the elements of the tort of malicious prosecution onto a section 1983 Fourth Amendment claim" and making "the tort of malicious prosecution actionable under section 1983".[19] As it has done in its prior decisions, the Tenth Circuit here treated the common law as a starting point for analyzing the claim, but did so "in light of Fourth Amendment guarantees." App. 14. Prior precedent in the Circuit which followed this same analytical path had established a five element test, which the court applied. App. 18.

The Petitioners' misstatement of the foundation of the decision in this case was carried through the Petition in various ways, providing a partial basis for expanding the circuit split analysis beyond what the other Circuits

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[16] *Castellano, supra* n. 14.

[17] *Gregory v. Louisville*, 444 F.3rd 725 (6th Cir. 2006), cert dismissed *Katz v. Gregory*, 549 U.S. 103, 127 S.Ct. 851 (2006), cert denied, *Carter v. Gregory*, 549 U.S. 1114,127 S.Ct. 962 (2007).

[18] Petition for certiorari at 14.

[19] Petition at 20.

have actually decided. The first use of this red herring by the Petitioners is the favorable termination requirement. As they argue this point, they merely return to the assertion that the Tenth Circuit relied on state common law, and cite no cases holding there is no favorable termination requirement in the constitutional claim. The split among the circuits on this issue, which doesn't appear to actually exist,[20] is not significant enough to grant certiorari. Petitioners have not even described a meaningful split on the favorable termination issue, but instead anchor their circuit split argument to the red herring from this case.

They rely on *Boyd v. City of NY*, 336 F.3d 72 (2d Cir. 2003) as applying New York common law. However, both state and federal claims were brought in that case, as they frequently are, and the quotation about virtual identity of state and federal law traces back to a much earlier line of cases. *E.g. Raysor v. Port Authority of New York*, 768 F.2d 34, 39-40 (2d Cir. 1985). Those cases recognized the constitutional right being asserted, but "borrowed" the tort elements of false arrest and malicious prosecution to adjudicate them.[21] One of the formative cases, *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995) specifically recognized: "The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person i.e., the right to be free of

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[20] Apparently only a single Fourth Circuit decision so held. However, favorable termination was later required in *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005).

[21] *E.g. Cook v. Sheldon*, 41 F.3d 73, 78-79 (2d Cir. 1994)

unreasonable or unwarranted restraints on personal liberty." By the time *Boyd* was decided, shorthand description and citation replaced detailed discussion. This does not amount to the use of state tort law instead of the Fourth Amendment, but rather to a very similar analysis to the Tenth Circuit's, where the constitutional right is analyzed and applied, while being informed by common law principles. In virtually all of the reported Second Circuit cases, the decision turns on the requirement of the absence of probable cause, a Fourth Amendment foundational principle which coincides with an element of common law malicious prosecution.

Petitioners also rely on *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) as constituting a conflict because the Court there cited a state court decision on common law malicious prosecution. But after doing so, the Court said, "We assume, for argument's sake, that the appellants made a sufficient showing on these four points to avoid summary judgment. Even so, more is needed to transform malicious prosecution into a claim cognizable under section 1983." *Id.* The Court then analyzed the Fourth Amendment claim and held there was no arrest, and no post-arraignment seizure within the meaning of the Fourth Amendment. This case simply doesn't do what little the Petitioners claim for it.

Petitioners also complain proof of malice was required of Respondents, deriving from the common law, though they say in the Third and Fourth Circuits it is not. The Fourth Circuit Court observed that the subjective state of mind of the police officers should be irrelevant under Fourth Amendment analysis. *Lambert v. Williams*, 223 F.3d 257, 262 n2 (4th Cir. 2000)

citing *Brooks v. City of Winston Salem*, 85 F.3d 178, n. 5 (4th Cir. 1996) (relying on the objective test of *Graham v. Connor*, 490 U.S. 386, 396, 97, 399 (1989)). But the Third Circuit, in *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003), requires proof of five elements, the fourth of which is "the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice."[22] This more recent case demonstrates that the Third Circuit requires a showing of malice.

Though one Circuit applies an objective standard in the malicious prosecution context, and while clarification of this issue may be helpful to courts and litigants in other cases, possible elimination of the malice element is no reason to grant certiorari in this case. Such a decision would make no difference in the qualified immunity context of this appeal, since malice was shown, and Petitioners can hardly be heard to complain of this additional burden placed on Respondents. Moreover, the District Court in this case recognized uncertainty about whether that element was required, noted doubt previously expressed by the Tenth Circuit, but found that malice existed if the element is required. App. 120-121.[23] Here, there is little question of actual and legal

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[22] Opinion following remand, 430 F.3d 140 (3d Cir. 2005). This case is later than the observation in footnote 6 of *Gallo v. City of Philadelphia*, 217, 222 n6 (3rd Cir. 1998) "For instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice." This reflection falls short of Petitioners' claim: "an observation by the Third Circuit that an objective standard should apply." Pet.16.

[23] In the District Court's view, three elements must be shown: initiation, favorable termination and lack of probable (Cont'd)

malice. Petitioners targeted Wilkins, whom DeReyes thought had wronged him personally, in order to charge him with four murders and compel him and his best friend to face the death penalty.

After *Albright*, some uncertainty initially existed. However, all circuits now recognize the need for a constitutional violation to be pled and proven.[24] Some continue to label it a § 1983 malicious prosecution claim while others characterize it as a fourth amendment claim of continuing detention without probable cause. Some Courts are guided more than others by the tort elements from the restatement.[25] Some commentators even suggest that the classical tort elements amount to a fourth amendment violation. See Note, *supra.* at 657 *et seq.* Yet, when recent decisions are reviewed, their

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(Cont'd)
cause. App. 120. The Tenth Circuit recited five elements, adding the malice requirement and resultant damages to the District Court's formulation. App. 19.

[24] *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001); *Cook v. Sheldon*, 41 F.3d 73, 78-79 (2d Cir. 1994); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2nd Cir.1995); *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003); *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005); *Castellano v. Fragozo*, 352 F.3d 939 (4th Cir. 2003), *cert. denied*, 543 U.S. 808, 125 S.Ct. 31, 160 L.Ed.2d 10 (2004); *Gregory v. Louisville*, 444 F.3d 725 (6th Cir. 2006) *cert dismissed Katz v. Gregory*, 549 U.S. 103, 127 S.Ct. 851 (2006), *cert denied*, *Tarter v. Gregory*, 549 U.S. 1114,127 S.Ct. 962 (2007).

[25] *See, e.g., Eloy v. Guillot*, No. 07-13818, (11th Cir. July 11, 2008).

requirements don't vary importantly.[26] The urgency claimed by Petitioners and their amicus is simply missing, especially in this case. By now, there is general acceptance by all Circuits that the Fourth Amendment provides a basis for such a claim, with common law malicious prosecution tort elements as the analytical starting point to consider in the context of the case.

The Tenth Circuit did that in this case. The Petitioners cite *Franz v. Village of Bradford*, 245 F.3d 869 (6th Cir. 2001), which, like the Tenth Circuit, recognized the Fourth Amendment underpinning of these claims. The Sixth Circuit later found that Franz "broke from the ranks of nine other Circuit Courts of Appeals,"[27] and its holding that the tort law of individual states does not control the Fourth Amendment claims brought under § 1983 is virtually universal, and still applied in the Sixth Circuit *See Gregory v. City of Louisville*, 444 F.3d 725, 749-50, *cert dismissed Katz v.*

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[26] The Seventh Circuit is sometimes viewed as an exception but *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001) decided no Fourth Amendment issue since the statute of limitations had expired. The court merely offered this dicta: "if a fourth amendment claim can be established, nothing can be gained by calling the legal theory 'malicious prosecution.' " *Id.* at 751. *See Ienco v. City of Chicago*, 286 F.3d 994, 1000 (7th Cir. 2002); *Gauger v. Hendle*, 349 F.3d 354, 359 (7th Cir. 2003), "It is shocking to think that a police frame-up which lands a person on death row is not a constitutional tort, though every false arrest made without probable cause is."

[27] *Darrah v. City of Oak Park*, 255 F.3d 301, 308 (6th Cir. 2001) discussed in *Nahmod*, LAW OF SECTION 1983 CAUSES OF ACTION, 4th Ed. Vol. 1, §3:67 at 3-301, n 28.

Gregory, 549 U.S. 103, 127 S.Ct. 851 (2006), *cert denied*, *Tarter v. Gregory*, 549 U.S. 1114,127 S.Ct. 962 (2007). The Tenth Circuit did so in *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004) on which it relied in this case. App. 14. The Tenth Circuit has long followed this Court's lead in *Carey v. Piphus*, 435 U.S. 247, 257-258, 98 S.Ct. 1042, 1048-1050, 55 L.Ed.2d 252 (1978) and treated common law tort elements as a "starting point" for analysis, but has considered the laws of various states as being applicable by analogy to constitutional torts. *E.g. Pierce, supra*, ¶51-53. esp. n. 7. The application in this case of the general common law to consideration of the elements of constitutional torts coincides with this Court's choice of those elements in discussion of the constitutional malicious prosecution claim in *Heck v. Humphrey*, 512 U.S. 477, 484-86 (1994) where this Court, after surveying various treatises and case law from several jurisdictions, concluded that a favorable termination was constitutionally required in a Section 1983 constitutional claim sounding in malicious prosecution.[28] Petitioners

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[28] The Court explained:

> "This requirement 'avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.' 8 S. Speiser, C. Krause, & A. Gans, *American Law of Torts* § 28:5, p. 24 (1991)."

(Cont'd)

here ignore *Heck*, as though it does not contain that requirement, and seek certiorari to have this Court restate that decision.[29]

The petitioners contend there are circuits which do not follow the longstanding dictate of *Carey* and other cases to consider the general common law as a starting point rather than the controlling substantive law of § 1983 claims. They point to the extensive analysis in *Castellano v. Fragozo*, 352 F.3d 959 (5th Cir. 2003), *cert denied*, 543 U.S. 808, 125 S.Ct. 31, 160 L.Ed.2d 10 (2004) an *en banc* decision. However, the *Castellano* Court did not hold that the Fourth Amendment had no relationship to the evidence fabrication claims which led to the Plaintiff's arrest and prosecution, but rather concluded that a due process claim previously dismissed applied to the trial portions of the constitutional violation, and remanded for trial on both claims.[30]

Finally, though it has no bearing on the claimed conflict among the circuits, this decision is not in

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(Cont'd)

Id. But see the discussion in Justice Souter's concurring opinion of the limits of reliance on the common law elements of malicious prosecution, and the Court's rejoinder in fn. 4.

[29] The circuits which have no favorable termination requirement make an exception to the *Heck v. Humphrey*, 512 U.S. 477 (1994) rule for those who, though convicted, seek different relief through §1983. See e.g. *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592 (6th Cir. 2007) and cited cases.

[30] The Tenth Circuit relied on *Castellano* in *Pierce*, *supra*.

conflict with the Tenth Circuit's own decision in another case.[31]

II. WHERE THE TENTH CIRCUIT DID NOT EXERCISE ITS PENDENT APPELLATE JURISDICTION IN THIS QUALIFIED IMMUNITY INTERLOCUTORY APPEAL TO DECIDE THE STATUTE OF LIMITATIONS ISSUE, THIS COURT SHOULD NOT GRANT CERTIORARI ON THE QUESTION.

The Tenth Circuit remanded the statute of limitations issue after this Court decided *Wallace v. Kato*, 127 S.Ct. 1091 (2007). (App. 56). The District Court rendered a supplemental decision (App. 36) which held that the statute of limitations did not bar the constitutional malicious prosecution claim because the statute did not begin to run until conclusion of the state criminal prosecution due to the favorable outcome requirement of the Section 1983 Fourth Amendment

[31] The Panel in *Mondragon v. Thompson*, 519 F.3d 1078 (10th Cir, 2008) specifically disclaimed any decision on issues presented in the case other than the limitations question, which required remand for further development. Id. n. 5, 6. Then, *in dicta*, the panel specifically left open the possibility of a malicious prosecution type Fourth Amendment claim arising after the first one ends, citing note 2 in *Wallace v. Kato*, 127 S. Ct. 1091, 1096, 166 L. Ed. 2d 973 (2007). In note 5 of its decision in *Wilkins*, the Court said ". . . because the institution of legal process separates the two claims – and thus makes them legally distinct – we think the two claims, although granted in the same constitutional provision, can co-exist." *Wilkins* contains no inconsistency with *Mondragon*, cites *Mondragon* in the decision, and denied rehearing on Petitioners' claim of inconsistency. App. 140.

claim sounding in malicious prosecution. The Tenth Circuit noted that decision, held the due process statute of limitations issue to be moot, then said that only the Fourth Amendment claim needed to be addressed on this qualified immunity appeal. In doing so, the Court found the favorable outcome requirement to be applicable to the Fourth Amendment claim, and determined that it was satisfied by Respondents (App. 29-31). The Tenth Circuit did not further discuss nor decide the statute of limitations issue, (App. 11), but instead simply affirmed the denial of qualified immunity (App. 34). Since the Tenth Circuit did not exercise pendent appellate jurisdiction over the statute of limitations question, it is inappropriate for this Court to grant certiorari to determine that issue.

III. THE REMAINING ARGUMENTS FOR GRANTING CERTIORARI ARE UNPERSUASIVE

Petitioners make four additional arguments for granting certiorari. First, they urge elimination of confusion in the circuits by holding that the elements of the tort of malicious prosecution play no role in this case. This would require reexamining the *Carey v. Piphus*, 435 U.S. 247, 257-258, 98 S.Ct. 1042, 1048-1050, 55 L.Ed.2d 252 (1978), and its progeny, which would serve little purpose. Respondents acknowledge Courts and litigants face some uncertainties in the formulation and determination of these claims,[32] though with fewer substantial differences than some of the variations in

[32] See discussion in Note, 106 Colum. L. Rev. at 653-657.

language might suggest.[33] However, this qualified immunity appeal is not the optimal case to conduct such a comprehensive review. The factual context of this case is unconventional, since the personal vendetta of Petitioner DeReyes confirmed by his own statements on a withheld, then later discovered videotape, is a rarity in the reported decisions. Moreover, despite the efforts of Petitioners and their Amicus to argue them,[34]

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[33] *Id.* at 655.

[34] The Amicus brief offers little assistance to this Court in deciding whether to grant certiorari. It relies on a paragraph of the complaint (App. To Amicus Brief), which alleges various areas of possible damages from the constitutional violation, characterizes it as a substantive claim, then seeks to urges this Court to restrict the Fourth Amendment claim itself. This argument goes well beyond the qualified immunity issue presented and decided by the Tenth Circuit to a "sky is falling" assertion that damages must be limited to those suffered at the moment of unlawful seizure, may not be influenced by consequent impacts on Plaintiffs which are directly caused by wrongful initiation of custody and subjection to the criminal justice system. They add that this Tenth Circuit case, which never even reached those issues, is a major threat to law enforcement. (Br. Amicus at 2-3). This brief mischaracterizes the Tenth Circuit's decision (It miscites the Petition (*Id.* at 4) and makes no direct citation to the Court's decision, suggesting it remains unread by Amicus.) Then, it erroneously argues that the misstated decision created liability for post arrest events, and must be reversed to thwart this alarming trend. The entire amicus brief proceeds on these erroneous assumptions, and, for that reason alone, provides no meaningful assistance to this Court. Its consideration of the Tenth-Circuit position on the scope of the Fourth Amendment relies on a 1991 opinion which Amicus concedes was abrogated. (Br. Amicus at 14) instead of the opinion in this case.

consideration of potential damages and other adverse consequences as well as factual disputes which underlie those issues is outside the range of this qualified immunity appeal. Analysis of the scope of the constitutional right in this restrictive environment promises limited clarification and even greater confusion in this area than would an appeal of a final judgment after a trial during which a full range of issues could be addressed. By then, summary judgment decisions will have been followed by rulings on motions in limine, jury instructions, trial rulings and post trial motions, so as to permit a serious consideration of issues such as those raised, but not properly before this court at this stage in this case.

Petitioners and their Amicus also urge the court to grant certiorari so as to provide fair warning to law enforcement concerning fourth amendment malicious prosecution. This Court and the Circuit Courts of Appeals have always decided constitutional cases which provide ample warning to police concerning constitutional rights of citizens. The qualified immunity jurisprudence is not meant so much assure such warning as to determine whether the officers had warning from other prior sources. Thus, the Court very recently decided that the two step process required in *Saucier v. Katz*, 533 U.S. 194 can be abridged, in part, because the constitutional development purpose of the first step, may "provide little guidance for future cases" because it is either so fact-bound or may "create risk of bad decision making" and limit appellate review. The two step process also forced Courts to violate the rule "not to pass on constitutional questions unless such

adjudication is unavoidable." *Pearson v. Callahan*, No. 07-751, Dec. Jan. 21, 2009, slip. Op at 13-16. (omitting internal citations).

Finally, in footnote 12 of the petition, Petitioners recite that they do not waive certiorari review on other issues on which they have not sought certiorari. These should be disregarded, as they are not before the court.

CONCLUSION

The qualified immunity decision of the Tenth Circuit does not present an adequate opportunity to broadly consider the range of issues essential to meaningfully decide the scope of a Fourth Amendment violation in the context presented here, where classical malicious prosecution principles are intertwined with constitutional claims brought pursuant to 42 U.S.C. § 1983. The split among the circuits on the broad range of issues arising in a Fourth Amendment case sounding in malicious prosecution, while important, and the desirability of meaningful guidance from this Court, while evident, dictate that the Court await an appropriate vehicle to meaningfully address the important issues. Since this case is not in that posture, and allows for consideration only of less important issues on which there is little real disagreement, the Petition for Certiorari should be denied.

Respectfully submitted,

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